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Supreme Court, U.S.
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No. _____

In The
Supreme Court Of The United States

OCTOBER TERM, 1986

STATE OF CONNECTICUT,
Petitioner,

v.

JOSEPH WHELAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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QUESTIONS PRESENTED

I. WHETHER A JURY INSTRUCTION THAT AN INFERENCE MAY BE DRAWN FROM CIRCUMSTANTIAL EVIDENCE IF IT "IS NOT ONLY LOGICAL AND REASONABLE BUT IS STRONG ENOUGH SO THAT YOU CAN FIND THAT IT IS MORE PROBABLE THAN NOT THAT THE FACT TO BE INFERRED IS TRUE" DEPRIVED THE DEFENDANT OF THE FUNDAMENTAL RIGHT TO A FAIR TRIAL, WHERE THE JURY WAS ALSO INSTRUCTED AT FORTY DIFFERENT TIMES THAT THE STATE BORE THE BURDEN OF PROOF ON THE ELEMENTS OF THE CRIME BEYOND A REASONABLE DOUBT?

II. WHETHER EVEN AN ERRONEOUS INSTRUCTION CONCERNING THE STANDARD OF PROOF FOR DRAWING INFERENCES SHOULD BE SUBJECT TO HARMLESS ERROR ANALYSIS?

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STATE OF CONNECTICUT,
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v.

JOSEPH WHELAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

The State of Connecticut petitions for a writ of certiorari to review the judgment of the Connecticut Supreme Court in this case.

OPINION BELOW

The opinion of the Connecticut Supreme Court (App. at 1a-16a) is reported at 200 Conn. 743, ____ A.2d ____ (1986).

JURISDICTION

The judgment of the Connecticut Supreme Court was rendered on August 5, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution states in part: "[N]or shall any state deprive any person of life, liberty or property, without due process of law . . . ".

STATEMENT OF THE CASE

The respondent was convicted of murder after a jury trial in Connecticut Superior Court. *See* Conn. Gen. Stat. § 53a-54a (Rev. to 1979). He was sentenced to a term of imprisonment of twenty-five years to life. T. at 358; R. at 5-6.[1] On appeal, the Connecticut Supreme Court reversed, finding error in the trial court's instruction that the jury could draw inferences if "the inference asked to be drawn is not only logical and reasonable but is strong enough that you can find *that it is more probable than not that the fact to be inferred is true.*" App. at 13a. The Connecticut Supreme Court held, on federal constitutional grounds, that the instruction unconstitutionally diluted the state's burden of proving the essential elements of the crime beyond a reasonable doubt. App. at 13a, 14a. The Connecticut Supreme Court's opinion discounted the fact that the jury was specifically instructed forty different times during the charge that the state must prove the elements of the crime beyond a reasonable doubt.

1. The Crime

The respondent and a companion named Romano entered Casey's Pub in Bridgeport, Connecticut shortly after midnight on February 24, 1980. Tr. at 62. The two men were wearing their Hell's Angels "colors." Tr. at 63, 183. The victim, John Matulionis, a "regular" at the pub, who was known as "John J.," had been there most of the evening. Tr. at 62. About twenty minutes after the respondent arrived, he attacked John J. following a brief verbal exchange. Tr. at 69.

The respondent pushed the victim back into a chair and repeatedly punched him; the victim raised his hands in defense, then grabbed the respondent in a self-protective "bearhug." Tr. at 71. At this point, Romano grabbed John J.

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[1] References to the record are as follows: "R. at _____" refers to the record before the Connecticut Supreme Court.
"Tr. at _____" refers to the transcript of trial and sentencing proceedings.

from behind, pinning his arms, and the respondent resumed punching the victim; the pummelling continued even after Romano and John J. fell to the floor. Tr. at 73–74. When all three men came back to their feet, the respondent thrust his arms at the victim's torso several more times before the victim could escape from Romano's grasp. Tr. at 75–76. As the respondent and Romano hurried out of the bar, John J. collapsed and died. R. at 76. The cause of death was a 20 centimeter deep stab wound which passed through his heart and into his esophagus. Tr. at 37–38. The respondent admitted stabbing John J.; Tr. at 211; but claimed that he did so in self defense. Tr. at 216.

2. The Jury Charge

The trial court's charge to the jury included a general instruction on circumstantial evidence which had long been a standard instruction in Connecticut. That instruction reads in relevant part:

> "[A]n inference may be made provided two elements in the application of this rule are satisfied: That the inference asked to be drawn is not only logical and reasonable but is strong enough so that you can find that it is more probable than not that the fact to be inferred is true — that the fact from which you are asked to draw the inference has itself been proven beyond a reasonable doubt. It is your right to draw inferences if you conclude that the facts you find proven reasonably establish other facts by reason and logic and are not the result of speculation, surmise or guesswork."

App. at 13a, n.11; Tr. at 293.

The trial court's specific instructions on the elements of murder stated no fewer than eleven times that the state must prove intent to kill beyond a reasonable doubt. Tr. at 288–9, 299, 300, 301, 302 (twice), 303, 304, 305, 308, 320. The

instructions on the lesser included offense of manslaughter in the first degree stated five times that the state had to prove intent beyond a reasonable doubt. Tr. at 306, 307, 309, 311, 320. In all, the state's burden of proof beyond a reasonable doubt was mentioned at least forty times in the court's instructions.

The respondent did not object to the trial court's circumstantial evidence instruction at the time of trial. App. at 13–14. In respondent's initial brief in the Connecticut Supreme Court, he did not challenge that portion of the jury charge. The respondent's first and only challenge to the charge was raised in a supplemental brief filed after the state's brief was filed. App. at 13.[2]

3. The Connecticut Supreme Court's Opinion

In its opinion, the Connecticut Supreme Court reversed the respondent's murder conviction, holding that the single use of the phrase "more probable than not" in the general instruction on inferences "unconstitutionally diluted the state's burden of proving the crime beyond a reasonable doubt." App. at 13. It further concluded that the instruction that inferences could be drawn if they were "more probable than not" was an incorrect statement of law, and adopted a lower court test which requires "close scrutiny" of a "more probable than not" inferences instruction where intent is a disputed issue in the case. The Connecticut Court contrasted "intent" cases with those in which identity was the issue in dispute. In "identity" cases, the Court held that it would continue to analyze the charge in its entirety to determine whether the jury could have been misled. App. at 15.[3] This

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[2] The State did file a responsive supplemental brief.

[3] The Connecticut Supreme Court has not defined "close scrutiny" except by contrasting it with the ordinary standard of review. That court has reversed both cases in which it has applied "close scrutiny." App. at 13a; *State v. Rodgers*, 198 Conn. 53, 58, 502 A.2d 360 (1985).

two-level analysis indicates that the Court has effectively created a *per se* rule of error where the challenged inferences instruction occurs in an "intent" case. *See* App. at 15–16.[4]

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[4] In *State v. Rodgers*, 198 Conn. 53, 58, 502 A.2d 360 (1985) the same court reversed a conviction for sexual assault in the first degree on the basis of an essentially identical instruction. In that case, the court stated:

> Ordinarily, for a determination of whether the jury has been misled, a charge is to be read as a whole, and detached clauses are not to be considered by themselves but in connection with the whole. *State v. Marra*, 195 Conn. 421, 440–41, 489 A.2d 350 (1985). We cannot bring the case within the purview of this rule. Much of the evidence produced by the state was circumstantial evidence, especially that bearing on the issue of criminal intent as it related to the crimes charged in the substitute information.

REASONS FOR GRANTING THE WRIT

This case is appropriate for review: (1) because the Connecticut Supreme Court's analysis of the nature of inferences and the relationship between inferences and the burden of proof is in direct conflict with this Court's cases on the subject; (2) the Connecticut Supreme Court's opinion conflicts with the majority of state and federal decisions concerning circumstantial evidence; and (3) because the administration of justice is inordinately affected by the Connecticut Supreme Court's ruling declaring unconstitutional a correct jury instruction which had been used routinely for years in criminal cases.

The case also presents for review the question of whether an instruction that is found to diminish the state's burden of proof concerning inferences should be subject to harmless error analysis. The Connecticut Supreme Court's refusal to read the charge as a whole in this case, solely because intent was the principal issue in dispute, is in direct conflict with this Court's recent holding in *Rose v. Clark*, _____ U.S. _____, 106 S. Ct. 3101, 3109 (1986).

This Court should grant the petition and review the decision below.[5]

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[5] Although the State did not address the arguments presented here in exactly the same form in its brief below, it is clear that the Connecticut Supreme Court both considered and addressed these questions. *See Illinois v. Gates*, 462 U.S. 213, 217-220 (1984).

I. THE CONNECTICUT SUPREME COURT ERRONEOUSLY MISCONSTRUED THE RELATIONSHIP OF CIRCUMSTANTIAL EVIDENCE TO THE BURDEN OF PROOF, CREATING A CONFLICT WITH DECISIONS OF THIS COURT AND OF STATE COURTS, AND THREATENING THE ORDERLY ADMINISTRATION OF JUSTICE.

A. The Connecticut Supreme Court's Analysis Of The Nature Of Inferences and the Relationship Between Inferences And The Burden Of Proof Is In Direct Conflict With Decisions Of This Court.

The State bears the burden of proving every element of an offense beyond a reasonable doubt. *In Re Winship*, 397 U.S. 358, 364 (1970). Only ultimate facts comprising the elements of a crime, however, need to be proven beyond a reasonable doubt. The state need not meet this burden for every subordinate fact leading to the ultimate fact. McCormick Evidence, Ch. 36, § 341 p. 962, n.6 (3d. Ed., 1984).[6] The Connecticut Supreme Court, however, has expanded this burden by requiring the state to prove beyond a reasonable doubt every fact proven by circumstantial evidence.

The challenged instruction in this case informed the jury that they could draw inferences from proven facts if it was "more probable than not that the fact to be inferred is true." The Connecticut Supreme Court held that the instruction is

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[6] The Connecticut Supreme Court has acknowledged this rule in passing in a previous decision. *State v. Rodgers*, 198 Conn. 53, 58 n.1, 502 A.2d 360 (1985). This acknowledgement, however, has clearly been ignored by the court both in this case and in *Rodgers*. Each case held that an instruction that inferences may be drawn if "more likely than not true" was erroneous under all circumstances, but that the error could be cured or rendered harmless if the central issue in the case was "identity" rather than "intent." *See* argument II, *infra*.

always erroneous, regardless of the factual situation in which it is given. *State v. Whalen,* 200 Conn. 743, at 758 (1986); App. at 16a. *See also State v. Rodgers,* 198 Conn. 53, 59, 60, 502 A.2d 360 (1985).[7]

An inference is, most simply, a way of thinking about events. As such, any *single* inference is unrelated to the probative force or value of the evidence upon which it rests.

> "*[A]ny* single vision about the world or conclusion of facts rests on a *multitude* of inferences, premises, and beliefs, on a large complex of assumptions, and on a body of implicit and explicit principles by which the human organism perceives, organizes, structures and understands experience . . . "

1A Wigmore, Evidence, § 41, p. 1112 (n.3) (Tilliers rev. 1983) (Emphasis in original). Because a conclusion of ultimate fact may be based on the combined effect of many subordinate facts which would individually have little probative value; J. Wigmore, Principles of Judicial Proof, § 28, pp. 50–52 (2d Ed. 1931); the rule announced by the court below severely restricts the process of drawing inferences by requiring subordinate facts to be proven beyond a reasonable doubt. Rather than protecting the constitutional rights of the accused, the ruling below unduly increases the State's burden of proof by restricting the use of circumstantial evidence, which is often critical to proof of a crime.

This Court has held, in a line of cases concerning statutory presumptions, that there is a clear distinction between the probative force required of predicate facts and the probative force required of ultimate conclusions in a criminal trial. In *Leary v. United States,* 395 U.S. 6, 36 (1969), the Court determined that inferences specifically commended to the attention

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[7] The court below has selectively applied a harmless error analysis to what it views as a presumptively erroneous instruction in these cases. That selective application of harmless error is the subject of the second issue raised by this petition. *See* argument II, *infra.*

of jurors must reflect generally accepted connections between related events. A connection is not rational "unless it can be said with substantial assurance that the presumed fact is *more likely than not* to flow from the proved fact on which it is made to depend." *Id.* (emphasis added). And in *Ulster County Court v. Allen*, 442 U.S. 140 (1979), the Court explicitly rejected the claim that an inferred or presumed predicate fact must be proven beyond a reasonable doubt. The Court said:

> Respondents' argument again overlooks the distinction between a permissive presumption on which the prosecution is entitled to rely as one not necessarily sufficient part of its proof and a mandatory presumption which the jury must accept even if it is the sole evidence of an element of the offense.
>
> In the latter situation, since the prosecution bears the burden of establishing guilt, it may not rest its case entirely on a presumption unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt. But in the former situation, the prosecution may rely on all of the evidence in the record to meet the reasonable doubt standard. There is no more reason to require a permissive statutory presumption to meet a reasonable doubt standard before it may be permitted to play any part in a trial than there is to require that degree of probative force for other relevant evidence before it may be admitted. As long as it is clear that the presumption is not the sole and sufficient basis for a finding of guilt, it need only satisfy the test described in *Leary*.

442 U.S. at 166–167. The Court also has recognized that the test for permissive statutory inferences and permissive common law inferences is the same. There must be a rational connection between the proved fact and the inferred fact. *Id.; Leary v. United States, supra*, 395 U.S. at 36; *see Tot v. United States*, 319 U.S. 463, 467–8 (1943).

The lesson of this Court's permissive presumption cases was lost on the Connecticut Supreme Court. All conclusory thought is inevitably based upon the drawing of inferences from observed or otherwise established predicate facts. The "more probable than not" charge in this case merely instructed the jury that they should reject those inferences which were comparatively unlikely to be true and which therefore may have been based largely upon conjecture. The instruction was a correct general statement of the jury's right to draw all reasonable inferences, without first subjecting them to the reasonable doubt standard. The Connecticut Court treated the instruction on inferences as though it were an instruction creating a mandatory presumption, and found, without analysis, that the instruction diminished the State's burden of proof. The flaw in this reasoning is that the circumstantial evidence instruction did not by itself implicate the burden of proof at all. Instead it provided guidance to the jury concerning a complex but common thought process. As a definition of the process of drawing inferences, the instruction was correct. The reversal of a murder conviction because of a correct instruction was unwarranted, and should be remedied by this Court.[8]

B. The Connecticut Supreme Court's Analysis Of The Probative Force Required Of Circumstantial Evidence Conflicts With The Majority Of State And Federal Courts Which Have Addressed The Issue.

An examination of state cases dealing with circumstantial evidence reveals a need for additional guidance

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[8] Petitioner is not suggesting that the inferences instruction given in this case could never be used in such a way that it would mislead the jury. As a general statement of law, however, the instruction is correct. If an element of the crime were proven solely by circumstantial evidence, and the instructions did not emphasize the burden of proof beyond a reasonable doubt as to that element, reversal might be required because the jury would quite probably be misled. The Connecticut Supreme Court's holding that this charge is erroneous whenever intent is in issue, however, is clearly wrong.

from this Court about the proper relationship between circumstantial evidence, inferences, and the State's burden of proving each element of the offense beyond a reasonable doubt. In ruling that it is improper to instruct the jury that it may draw inferences from circumstantial evidence whenever it finds that it is more probable than not that the inference is true, the Connecticut Supreme Court is in apparent conflict with the rulings of several other state courts.

The prosecution routinely relies on circumstantial evidence and inferences to prove its case. Thus, a circumstantial evidence charge is given in virtually every criminal case. Although the use of circumstantial evidence and inferences has been explained to the jury using differing terminology and examples, the majority of courts which have addressed these issues have concluded that the State need not establish each evidentiary fact or inference beyond a reasonable doubt before the jury is entitled to consider such fact or inference. For example, the New Jersey State Supreme Court has consistently held in the context of reviewing the sufficiency of the evidence that "a jury may draw an inference from a fact whenever it is more probable than not that the inference is true; the veracity of each inference need not be established beyond a reasonable doubt in order for the jury to draw the inference." *State v. Brown*, 80 N.J. 587, 404 A.2d 1111, 1113 (1979). The Supreme Judicial Court of Massachusetts has suggested in the same context that inferences need not be established beyond a reasonable doubt, stating that "an inference need only be reasonable and possible, it need not be necessary or inescapable." *Commonwealth v. Beckett*, 373 Mass. 329, 366 N.E.2d 1252, 1260 (1977).

Similarly, numerous courts have observed that not every link in the chain of circumstantial evidence needs to be established beyond a reasonable doubt. *See, e.g., People v. Klinkenberg*, 90 Cal.2d 608, 204 P.2d 47 (1949); *People v. Foster*, 76 Ill.2d 365, 392 N.E.2d 6, 9 (1979); *State v. Fitzpatrick*, 163 Mont. 220, 516 P.2d 605, 609 (1973). *See also State v. Cohen*, 108 Iowa 208, 78 N.W. 857, 857-858 (1899) (Court agreed

that state need not prove beyond a reasonable doubt every inculpatory fact but disapproved jury charge using link example as misleading). These courts have concluded that "[t]he doctrine of reasonable doubt applies to proof of guilt and not to the establishment of each incident or event inculpating the defendant." *People v. Klinkenberg*, 90 Cal.2d 608, 204 P.2d 47 (1949). *See, e.g., United States v. Hernandez-Miranda*, 601 F.2d 1104, 1107 (9th Cir. 1979) (Court approved jury instruction that State need not prove flight beyond a reasonable doubt before jury could consider defendant's flight as an inculpatory fact because flight was not an element of the offense); *State v. Raine*, 93 Idaho 862, 477 P.2d 104, 106 (1970) (Court approved jury charge instructing that the State need not prove beyond a reasonable doubt that the name defendant signed to a check was fictitious because the doctrine of proof beyond a reasonable doubt applies to proof of guilt and not to the establishment of each incident or event inculpating the defendant); *State v. Davis*, 25 N.C. App. 181, 212 S.E.2d 516, 518 (1975) (Court refused to charge that the jury must find that the evidential facts had been proven beyond a reasonable doubt stating that, "every element of the crime charged must be proved beyond a reasonable doubt but it is not necessary that every circumstance relied upon for conviction be established by that high standard of proof"); *State v. Barry*, 93 N.H. 10, 34 A.2d 661, 663 (1943) (Court observed that it is not essential that each evidentiary fact be established beyond a reasonable doubt); *State v. Green*, 126 Vt. 311, 228 A.2d 792, 793–794 (1967) (Court approved jury charge that stated "the law does not require that each particular incriminating fact which may aid you in determining if the accused is guilty should be proved beyond a reasonable doubt" because charge correctly informed jury that it must find proof beyond a reasonable doubt of each element of the offense).[9]

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[9] Petitioner notes that some of these cases were decided before the majority of this Court's opinions on presumptions, inferences, and the burden of proof. Petitioner has found no indication, however, that these decisions do not represent the current law in their respective jurisdictions.

A few jurisdictions, however, have concluded that this type of jury instruction, although generally acceptable, should not be given in all cases. These courts have expressed concern that a jury might be misled by this type of charge in a case where the circumstantial evidence or inference is the only evidence relating to an element of the offense. These courts have suggested, therefore, that the jury instructions should be modified in such cases in one of two ways: 1) by eliminating the reference to burdens of proof in the circumstantial evidence portion of the instruction or 2) by stressing to the jury that it has the duty to find proof beyond a reasonable doubt of the ultimate facts. *Williamson v. State,* 248 Ga. 47, 281 S.E.2d 512, 520 & n.9 (1981); *Pressley v. State,* 295 Md. 347, 454 A.2d 347 (1983); *see also Commonwealth v. Turner,* 456 Pa. 116, 317 A.2d 298, 300, 303 n.4 (1974) (plurality and concurring opinions) (Court disapproved jury instruction that permitted inference based upon the more likely than not standard, finding that proof beyond a reasonable doubt was required where the inferred fact was an element of the offense).

In this case, the Connecticut Supreme Court rejected both of the approaches discussed above. The Court found that the instruction was erroneous in all cases and was *per se* reversible error in cases where intent was in issue. (See part A *infra.*) This Court should take this opportunity to resolve this conflict to ensure that both the State and the defendant receive the benefit of correct jury instructions on the use of circumstantial evidence and inferences.

C. The Connecticut Supreme Court's Erroneous Finding Of Constitutional Error Has A Significant Detrimental Impact On The Finality Of Judgments And The Administration Of Justice.

The respondent did not challenge the inferences instruction at trial. Under Connecticut law, a claim of error raised for the first time on appeal is ordinarily reviewable only "where

the defendant can demonstrate the deprivation of a fundamental constitutional right and a fair trial." *State v. Whalen,* 200 Conn., at 756; App. at 12a. The Connecticut Supreme Court reviewed this claim despite the respondent's failure to preserve it.[10] That court thus placed a constitutional label on the claim and concluded that the instruction deprived the respondent of a fundamental constitutional right and a fair trial. That court's willingness to review this claim even though it was first made on appeal has already resulted in a flood of litigation which seriously challenges the finality of dozens of judgments in Connecticut. If other states accept Connecticut's erroneous theory that all inferences in a criminal case must meet the reasonable doubt standard, the effect nationwide could be dramatic.

Connecticut is a small state, with only twelve full-time appellate judges. Approximately 237 opinions were issued in criminal appeals during the entire 1985 term. Following the decision in December, 1985 of *State v. Rodgers,* 198 Conn. 53, 502 A.2d 360 (1985), a predecessor to this case, inferences instructions have been challenged in at least fourteen filed appellate briefs. In none of those appeals was this long-accepted inferences instruction challenged at trial. In eight of the cases, including this one, the defendant's claim of error was raised or sought to be raised by supplemental brief. At least fifteen pending appeals involve substantially similar jury instructions. Thus far, one habeas corpus case raising this issue has been filed. Experience dictates that it is only a matter of time before federal district courts will also be required to address this claim in collateral proceedings.

The effect of the Connecticut Supreme Court's *per se* reversal rule (in "intent" cases; *see* arguments IA, *supra* and II, *infra)* is likely to lead to a reversal of most of those convictions currently on appeal. It is impossible to predict the effect

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[10] In fact, the defendant did not raise this claim in his original appellate brief, but only in a supplemental brief filed after the state's brief had been filed.

of the court's holding on those whose appeals have become final. It is clear, however, that the effect of the erroneous holding of the Connecticut Supreme Court on the administration of justice in Connecticut state and federal courts is great enough that this Court should grant the writ and correct the error in the interests of justice. If the ruling below begins to infect the law of circumstantial evidence in other states, the need for correction will be compelling. Because the constitutional error committed below carries the potential for creating such far-reaching havoc, its correction should not await further repetition.

II. THE CONNECTICUT SUPREME COURT'S REFUSAL TO APPLY HARMLESS ERROR ANALYSIS SOLELY BECAUSE "INTENT" RATHER THAN "IDENTITY" WAS THE PRINCIPLE FACTUAL ISSUE IN THE CASE IS IN DIRECT CONFLICT WITH *ROSE V. CLARK* _____ U.S. _____, 106 S. CT. 3101 (1986).

The court below found the "more probable than not" inferences instruction to be an incorrect statement of the law. *State v. Whalen,* 200 Conn. at 757; App. at 15a. In addressing the state's claim that any error was harmless beyond a reasonable doubt, the court adopted a two-tiered harmless error analysis to be applied only to cases in which this particular instruction was given. This novel harmless error rule requires "close scrutiny" of the instruction, if and only if, "the principal factual issue is intent." *Id.*[11]

The court contrasted the approach for intent cases to those in which the "principal factual issue is identity." In identity cases, "the trial court's instructions may be read as

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[11] As a practical matter, the "close scrutiny" review created for this case is a rule of *per se* reversible error in cases where intent is an issue at trial.

a whole to determine whether it is reasonably possible that the jury was misled. . . ." *Id.*[12]

Harmless error analysis in Connecticut is based upon federal law. *See, e.g., State v. Truppi,* 182 Conn. 449, 465, 438 A.2d 712 (1980) *cert. denied* 451 U.S. 941 (1981); *Aillon v. State,* 168 Conn. 541, 547–548, 363 A.2d 49 (1975). The harmless error doctrine includes the admonition that "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the whole charge." *Cupp v. Naughten,* 414 U.S. 141, 146–7 (1973); *see Sandstrom v. Montana,* 442 U.S. 510, 527 (1979) (Rehnquist J., concurring). More recently, this Court rejected the argument that harmless error analysis was inapplicable to *Sandstrom* error[13] in a case "where the defendant contests intent." *Rose v. Clark,* _____ U.S. _____, 106 S. Ct. 3101, 3109 (1986). This Court held that "our harmless error cases do not turn on whether the defendant conceded the factual issue on which the error bore. Rather, we have held that '*Chapman* mandates consideration of the entire record prior to reversing a conviction for constitutional errors that may be harmless.' *United States v. Hasting,* 461 U.S. [499], 509, n.7 [(1983)]." *Rose v. Clark,* 106 S. Ct. at 3109.

The Connecticut Supreme Court in this case departed dramatically from the "whole record" review that is required

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[12] In the earlier case of *State v. Rodgers,* 198 Conn. 53, 58, 502 A.2d 360 (1985), the court specifically acknowledged that it was departing from the "ordinary" standard of review. In *Rodgers,* the court stated:

> Ordinarily, for a determination of whether the jury has been misled, a charge is to be read as a whole, and detached clauses are not to be considered by themselves but in connection with the whole. *State v. Marra,* 195 Conn. 421, 440–41, 489 A.2d 350 (1985). We cannot bring the case within the purview of this rule. Much of the evidence produced by the state was circumstantial evidence, especially that bearing on the issue of criminal intent as it related to the crimes charged in the substitute information.

[13] *Sandstrom v. Montana,* 442 U.S. 510 (1979).

when reviewing a jury instruction; *Cupp v. Naughton, supra; see Rose v. Clark, supra.* The court created a level of heightened scrutiny that applies only to allegedly erroneous circumstantial evidence instructions, and only if intent is a principal disputed issue. This contrapuntal harmless error analysis, setting off "intent" cases from all others, was explicitly rejected by this Court in *Rose v. Clark, supra,* 106 S. Ct. at 3109, n.12.[14] If the mandatory presumption instruction of *Sandstrom* is subject to whole-record review and harmless error analysis, then review of the instruction on drawing permissive inferences, given in this case, must logically be subject to the same review. The Connecticut Supreme Court's departure from these rules requires reversal.

If the appropriate standard of review is applied to this case, the error of the Connecticut Supreme Court is striking. The inferences instruction that the Connecticut Supreme Court found to be erroneous was given one time, during the trial court's general instructions on the law. The trial court thereafter instructed the jury eleven times that the element of intent to commit murder must be proven beyond a reasonable doubt, and five times that the intent for manslaughter must be proven beyond a reasonable doubt. The state's burden of proof was repeated at least forty times during the entire jury charge. Despite the obvious conclusion that the jury was fully aware of the state's burden on every element of the crime, the Connecticut Supreme Court, under its "close scrutiny" analysis, refused to find any error harmless solely because the trial court "did not rectify the erroneous charge on circumstantial evidence." App. at 16.

The refusal of the Connecticut Supreme Court to consider that an allegedly erroneous instruction on permissive inferences could be harmless error is in direct conflict with this

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[14] The Connecticut Supreme Court departed not only from federal law, but also from its own well-established standard of review in *Sandstrom* cases. *See, e.g., State v. Arroyo,* 180 Conn. 171, 180, 429 A.2d 457 (1980); *see also State v. Avcollie,* 188 Conn. 626, 628, 453 A.2d 418 (1982); *cert. denied* 461 U.S. 928 (1983) (collecting cases).

Court's decision in *Rose v. Clark, supra,* that an erroneous instruction creating a mandatory presumption is subject to harmless error analysis.[15] The petition for certiorari should be granted, and the decision of the Connecticut Supreme Court reversed.[16]

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[15] There is no suggestion in the Connecticut Supreme Court's opinion that the refusal to apply harmless error analysis is based on independent state grounds. *See Michigan v. Long,* 463 U.S. 1032, 1040–1042 (1982).

[16] Petitioner is aware that this Court generally does not engage in harmless error analysis. *Rose v. Clark,* _____ U.S. _____, 106 S. Ct. 3101, 3109 (1986). It is submitted, however, that the instructions in this case so obviously could not have misled the jury that a departure from the general rule may be in order.

Alternatively, petitioner suggests that this case presents an appropriate one for summary reversal and remand in light of *Rose v. Clark, supra.*

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

THE STATE OF CONNECTICUT
Petitioner

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LINDA L. YODER

No. _____

In The
Supreme Court Of The United States

OCTOBER TERM, 1986

STATE OF CONNECTICUT,
Petitioner,

v.

JOSEPH WHELAN,
Respondent.

APPENDIX OF THE PETITIONER

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ble under *Evans*. Therefore, we decline to address the merits of the claim. Practice Book § 3063;[4] see *State* v. *Miller,* 186 Conn. 654, 672, 443 A.2d 906 (1982).

There is no error.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* JOSEPH WHELAN (12647)

PETERS, C. J., HEALEY, SHEA, DANNEHY and F. HENNESSY, Js.

A prior written inconsistent statement may be used at trial for substantive as well as impeachment purposes where the statement is signed by a declarant who has personal knowledge of the facts stated therein and who testifies at trial and is subject to cross-examination.

Convicted of the crime of murder in connection with a stabbing during a barroom fight, the defendant appealed to this court. *Held:*

1. The trial court did not err either in permitting the state to cross-examine its own witness concerning a prior inconsistent statement or in denying the defendant's request for an instruction limiting the use of that statement to impeachment; the signed out-of-court statement was made under circumstances reasonably assuring reliability, and the declarant testified at trial and was extensively examined by both the state and defense counsel concerning discrepancies between the prior statement and his in-court testimony.
2. The trial court erred in instructing the jurors that they could draw an inference from circumstantial evidence if they found that it was "more probable than not" that the fact to be inferred was true; because the focus of the case was intent, it was reasonably possible that the jury was misled with respect to the state's burden of proving that element of the crime beyond a reasonable doubt.

Argued June 10—decision released August 5, 1986

Indictment charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before

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[4] Practice Book § 3063 provides: "The supreme court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. The supreme court may in the interests of justice notice plain error not brought to the attention of the trial court."

McKeever, J., verdict and judgment of guilty, from which the defendant appealed to this court. *Error; new trial.*

G. Douglas Nash, assistant public defender, with whom, on the brief, was *Joette Katz,* public defender, for the appellant (defendant).

Jonathan C. Benedict, assistant state's attorney, with whom, on the brief, was *Donald A. Browne,* state's attorney, for the appellee (state).

SHEA, J. The defendant, Joseph Whelan, was convicted, after a jury trial, of murder in violation of General Statutes § 53a-54a (a).[1] He was sentenced to a term of imprisonment of not less than twenty-five years nor more than life. From this judgment the defendant appeals, claiming that the trial court erred: (1) in allowing the state to cross-examine its own witness; (2) in refusing to charge the jury, as requested, that a prior inconsistent statement of a witness was admissible only to discredit his testimony; (3) in refusing to grant his motion for a mistrial because of the prosecutor's comments during final argument;[2] and (4) in instructing

[1] "[General Statutes] Sec. 53a-54a. MURDER DEFINED. AFFIRMATIVE DEFENSES. EVIDENCE OF MENTAL CONDITION. CLASSIFICATION. (a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception; except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant committed the proscribed act or acts under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime."

[2] The defendant's claim of improper argument is twofold: (1) that the prosecutor referred to facts contained only in the questions he asked of a witness for impeachment purposes based upon a prior written statement given by the witness to the police; and (2) that, without any evidence connecting

the jury on drawing inferences from circumstantial evidence. We find error only in the instruction on circumstantial evidence and, therefore, remand the case for a new trial. We review the other claims of the defendant to the extent that they are likely to arise on retrial.

Shortly after midnight on February 24, 1980, the defendant entered a Bridgeport barroom. In the bar, the defendant and the victim, John Matulionis, became involved in a verbal altercation that developed into a fight. In the course of the fight, the defendant fatally stabbed the victim. At trial the defendant, testifying in his own behalf, acknowledged that he had stabbed Matulionis, but claimed that he had done so in self-defense. See General Statutes § 53a-19.

I

The first two claims of error are related to the use of a prior written statement given to the police by a witness called to testify for the state. We conclude that there was no error in the state's cross-examination of the witness and that the defendant's request for an instruction limiting the use of a prior inconsistent statement to impeachment was properly denied.

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the defendant to a car accident in which the witness was severely injured, the state had implied during cross-examination and argument that the witness had been intimidated by that incident and thus had decided not to remember facts contained in his prior statement.

In view of our conclusion in this case that a prior inconsistent statement may be used substantively and not only for the purpose of impeachment, it would not have been improper for the prosecutor to have referred to the facts contained in the statement as evidence. The statement, however, was never introduced into evidence and, therefore, references to its contents during argument were improper. Because we order a new trial as a result of the erroneous instruction upon circumstantial evidence, however, it is unnecessary for us to consider this claim further.

It was also improper for the prosecutor to suggest by innuendo, as he did during argument, that a car accident in which the witness was injured had effectively intimidated him from testifying truthfully. The trial court had previously indicated that any allusion to the cause of the car accident would be prejudicial. We do not anticipate that this issue will arise at the retrial we have ordered.

In an effort to establish that the defendant was indeed the aggressor, and thus to negate the claim that the killing was justified, the state called Louis Garassino, a patron who had been at the bar the night of the incident. He testified that he had arrived at the bar with a group of friends at about 7 p.m. and had remained there until after midnight when the stabbing occurred. When he was then asked to describe the stabbing incident, he claimed that he was unable to remember anything but that someone had been stabbed. He further claimed that he was unable to describe either of the individuals involved. The state then requested that the jury be excused from the courtroom. Outside the presence of the jury, Garassino was able to describe the two persons involved in the fight, but claimed to have no recollection of seeing the actual stabbing. In an attempt to refresh his recollection, Garassino was shown a written statement that he had given to the police soon after the incident. Although he acknowledged that he had made the statement and identified his signature thereon, he claimed that he "did not know" whether the statement refreshed his memory, because he had been intoxicated at the time and his memory of the event had deteriorated due to a recent automobile accident which had left him in a coma. He reiterated that the statement did not refresh his recollection except that he remembered the two participants were "Hells Angels" who reminded him of "Mutt and Jeff." He also stated that he was unable to vouch for the accuracy of the statement.[3]

Upon completion of the voir dire examination, the trial court concluded, after hearing argument on the matter, that Garassino was a hostile witness and

[3] Because the defendant was unable to vouch for the accuracy of the statement, it could not be admitted under the past recollection recorded exception to the hearsay rule, which this court has recognized. *Papas* v. *Aetna Ins. Co.*, 111 Conn. 415, 420, 150 A. 310 (1930).

allowed the state to cross-examine him concerning the detailed two page statement he had given to the police the night of the incident. The defendant duly excepted to the trial court's ruling. The jury was then summoned and the state proceeded to confront Garassino with each factual assertion contained in the prior statement concerning the details of the fight. As he had responded during the voir dire examination, the witness claimed he had no recollection of virtually every assertion in his prior statement.

The defendant's initial claim is that the court erred in declaring Garassino a hostile witness and, therefore, in allowing the state to cross-examine him regarding the prior out-of-court statement he had made to the police. This claim is based upon the common law rule which prohibits a party from impeaching his own witness, except where the party can establish the "hostility" of the witness or that he is "surprised" by the adverse testimony. *State* v. *McCarthy,* 197 Conn. 166, 177, 496 A.2d 190 (1985); *State* v. *Mitchell,* 169 Conn. 161, 164, 362 A.2d 808 (1975). The rationale behind the rule is that the party calling a witness vouches for the trustworthiness of the witness and is therefore bound by his testimony. McCormick, Evidence (3d ed.) § 38. Recognizing that its basis has become generally eroded, we have recently abandoned this rule, and have held that a party may impeach his own witness without a showing of surprise, hostility or adversity. *State* v. *Graham,* 200 Conn. 9, 17, 509 A.2d 493 (1986); see *State* v. *Rivera,* 200 Conn. 44, 49, 509 A.2d 505 (1986); *State* v. *Jasper,* 200 Conn. 30, 34, 508 A.2d 1387 (1986). " 'Whatever validity the "voucher" rule may once have enjoyed . . . it bears little present relationship to the realities of the criminal process.' " *State* v. *Graham,* supra, 16, quoting *Chambers* v. *Mississippi,* 410 U.S. 284, 296, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). Because we have abrogated the common law restric-

tion on impeachment of a witness by the party who calls him to testify, the defendant cannot prevail on his claim that the trial court erred in declaring the witness hostile.

Although it was appropriate for the court to exercise its discretion and allow the state to cross-examine its own witness, the defendant also makes a related claim involving the jury's use of the prior statement of Garassino. The defendant filed a timely request to charge with the court; Practice Book § 852; seeking an instruction that the prior statement be considered solely with respect to the credibility of the witness, and not as probative of the facts it contained. The court failed to grant the request and the defendant also excepted to the charge as given. Although we recognize that "a request to charge which is relevant to the issues of the case and which is an accurate statement of the law must be given . . . ."; *Mazzucco* v. *Krall Coal & Oil Co.*, 172 Conn. 355, 357, 374 A.2d 1047 (1977); see *State* v. *Shindell*, 195 Conn. 128, 143, 486 A.2d 637 (1985); we conclude that the trial court properly refused to limit the jury's use of the prior statement solely to impeachment purposes.

Heretofore, this court has adhered to the traditional view that a prior inconsistent statement[4] of a non-

[4] The defendant also claims that the trial court erred in concluding that the prior statement of the witness was inconsistent with his testimony at trial. He bases this contention on the fact that the witness did not expressly contradict his prior statement, but merely claimed he had no recollection of certain facts within it. We are unpersuaded by this claim. Whether there are inconsistencies between the two statements is properly a matter for the trial court. *State* v. *Reed*, 174 Conn. 287, 302–303, 386 A.2d 243 (1978); *State* v. *Piskorski*, 177 Conn. 677, 710, 419 A.2d 866, cert. denied, 444 U.S. 935, 100 S. Ct. 283, 62 L. Ed. 2d 194 (1979). Inconsistencies may be shown not only by contradictory statements but also by omissions. In determining whether an inconsistency exists, the testimony of a witness as a whole, or the whole impression or effect of what has been said, must be examined. *State* v. *Piskorski*, supra. "Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness' prior

party[5] witness is inadmissible hearsay if offered to prove the truth of the matters asserted therein, and, therefore, is admissible only for impeachment purposes. *State* v. *Villafane,* 171 Conn. 644, 672, 372 A.2d 82 (1976), cert. denied, 429 U.S. 1106, 97 S. Ct. 1137, 51 L. Ed. 2d 558 (1977); *State* v. *Raffone,* 161 Conn. 117, 124, 285 A.2d 323 (1971); *Sears* v. *Curtis,* 147 Conn. 311, 315–17, 160 A.2d 742 (1960); Tait & LaPlante, Handbook of Connecticut Evidence, § 7.24. The logic of this orthodox rule is that the prior inconsistent statement of a witness is too unreliable to be admitted as substantive evidence because the declarant was not (1) under oath and subject to punishment for perjury, (2) in the presence of the trier of fact, or (3) subject to cross-examination. See *State* v. *Saporen,* 205 Minn. 358, 361–63, 285 N.W. 898 (1939). This rule has been criticized by many legal scholars and commentators who maintain that the oath is not as strong a guaranty of trustworthiness as it once may have been, and that the requirements that the jury observe the declarant

statement . . . and the same principle governs the case of the forgetful witness." *People* v. *Green,* 3 Cal.3d 981, 988, 92 Cal. Rptr. 494, 479 P.2d 998 (1971). A statement's inconsistency may be determined from the circumstances and is not limited to cases in which diametrically opposed assertions have been made. Thus, inconsistencies may be found in changes in position and they may also be found in denial of recollection. See 3 Weinstein, Evidence § 607 (6) (1985). The trial court has considerable discretion to determine whether evasive answers are inconsistent with prior statements. *United States* v. *Rogers,* 549 F.2d 490 (1976); *State* v. *Harris,* 182 Conn. 220, 226, 438 A.2d 38 (1980). In this case, Garassino had given a sworn statement to the police concerning the incident, and yet, while testifying at trial, was unable to recall the specific details of the fight. Considering the selective memory loss of the witness, there was sufficient evidence from which the trial court could properly conclude that he, in fact, remembered the substance of the statements. See *Watkins* v. *State,* 446 N.E.2d 949 (Ind. 1983).

[5] The prior inconsistent statement of a party who is a witness in a proceeding has long been admissible as substantive evidence against that party. See *O'Brien* v. *John Hancock Mutual Life Ins. Co.,* 143 Conn. 25, 29–30, 119 A.2d 329 (1955); Tait & LaPlante, Handbook of Connecticut Evidence § 11.5; McCormick, Evidence § 251 (3d Ed. 1984).

and that the defendant have the opportunity to cross-examine are met where the declarant takes the stand and is subject to cross-examination. See, e.g., McCormick, Evidence, § 251 (3d ed. 1984); 3A Wigmore, Evidence, § 1018 (Chadbourn Rev. 1970); Graham, "Employing Inconsistent Statements for Impeachment and as Substantive Evidence," 75 Mich. L. Rev. 1565 (1977).

The commentators note that when the declarant is available for cross-examination the jury has the opportunity to observe him as he repudiates or varies his former statement. The cross-examination to which a recanting witness will be subjected is likely to be meaningful because the witness will be forced either to explain the discrepancies between the earlier statements and his present testimony, or to deny that the earlier statement was made at all. "If, from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person and in court." *DiCarlo* v. *United States,* 6 F.2d 364, 368 (2d Cir. 1925); see *United States* v. *Insana,* 423 F.2d 1165 (2d Cir. 1970); *United States* v. *De Sisto,* 329 F.2d 929 (2d Cir. 1964). The jury can, therefore, determine whether to believe the present testimony, the prior statement, or neither. Moreover, prior statements are, necessarily, made closer to the event in question, when memories are fresher and when there is less likelihood that the statement is the product of corruption, false suggestion, intimidation or appeals to sympathy. See Morgan, "Hearsay Dangers and the Application of the Hearsay Concept," 62 Harv. L. Rev. 177, 192 (1948). Quite simply, when the declarant is in court, under oath, and subject to cross-examination before the fact-finder concerning both his out-of-court and in-court statements, "the usual dangers of hear-

say are largely nonexistent . . . ." *California* v. *Green*, 399 U.S. 149, 155 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970).[6]

Largely on the basis of this criticism, a growing number of jurisdictions have abandoned the common law rule and now allow prior inconsistent statements as substantive evidence where the declarant takes the stand and is subject to cross-examination. See *Beavers* v. *State*, 492 P.2d 88 (Alaska 1971); *State* v. *Skinner*, 110 Ariz. 135, 515 P.2d 880 (1973); *People* v. *Freeman*, 20 Cal. App. 3d 488, 97 Cal Rptr. 717 (1971); *Gibbons* v. *State*, 248 Ga. 858, 286 S.E.2d 717 (1982); *Watkins* v. *State*, 446 N.E.2d 949 (Ind. 1983); *State* v. *Lott*, 207 Kan. 602, 485 P.2d 1314 (1971); *Nugent* v. *Commonwealth*, 639 S.W.2d 761 (Ky. 1982); *State* v. *Provet*, 133 N.J. Super. 432, 337 A.2d 374 (1975); *State* v. *Igoe*, 206 N.W.2d 291 (N.D. 1973); *Commonwealth* v. *Brady*, Pa. , 507 A.2d 66 (1986); *State* v. *Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982), cert. denied, 460 U.S. 1103, 103 S. Ct. 1802, 76 L. Ed. 2d 367, reh. denied, 462 U.S. 1124, 103 S. Ct. 3099, 77 L. Ed. 2d 1357 (1983); *Vogel* v. *State*, 96 Wis. 2d 372, 291 N.W.2d 838 (1980); see generally annot., 30 A.L.R.4th 414 (1984). The orthodox viewpoint " 'serves only to keep relevant and reliable evidence from the jury. Its result serves no greater principle than judicial inertia . . . a trial is, fundamentally, a search for an objective account of the events upon which criminal charges are based. An evidentiary rule which forces the searcher to ignore relevant clues whose reliability can be tested by cross-examination serves no purpose.' " *Commonwealth* v. *Brady*, supra, 70, quoting *Commonwealth* v. *Gee*, 467 Pa. 123, 146, 354 A.2d 875 (1976) (Roberts, J., dissenting).

[6] We note that because of these circumstances the United States Supreme Court has held that admission of a prior inconsistent statement for substantive purposes does not violate the confrontation clause. *California* v. *Green*, 399 U.S. 149, 165, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970).

In light of these considerations, we are persuaded that the prevailing reasons for refusing to allow any prior inconsistent statement to be used as substantive evidence are no longer valid. We believe an exception to the hearsay rule is necessary to allow the trial court to admit for substantive purposes prior inconsistent statements given under prescribed circumstances reasonably assuring reliability. This court has previously adopted exceptions to the hearsay rule " ' "where the statements are made under conditions deemed to render them equal in reliability and trustworthiness" to those made under "the sanction of an oath and the test of cross-examination." *'Cherniske* v. *Jajer,* 171 Conn. 372, 376–77, 370 A.2d 981 (1976); *General Motors Acceptance Corporation* v. *Capitol Garage, Inc.,* 154 Conn. 593, 597, 227 A.2d 548 (1967)." *State* v. *McClendon,* 199 Conn. 5, 10, 505 A.2d 685 (1986). Although we are impressed by the logic of the modern view favoring substantive admissibility for all prior inconsistent statements where the defendant is in court and subject to cross-examination, we are unwilling to abrogate, without adequate precautions, the traditional view prohibiting their substantive use. While the signed out-of-court statement in this case was made under sufficiently reliable circumstances, some out-of-court declarations lacking similar safeguards of reliability and accuracy must continue to be governed by the hearsay rule.

Substantive admissibility of prior oral statements[7] presents a hazard of error in reporting and increases

[7] We are aware that the United States Supreme Court has refused "to distinguish among prior inconsistent statements on the basis of the circumstances under which the prior statements were given. The subsequent opportunity for cross-examination at trial with respect to both the present and past versions of the event, is adequate to make equally admissible, as far as the Confrontation Clause is concerned, both the casual, off-hand remark to a stranger, and the carefully recorded testimony at a prior hearing." *California* v. *Green,* 399 U.S. 149, 168, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970). We distinguish the casual remark because of our concerns for the reliability of the statements, and do not rely upon a constitutional analysis.

the temptation and opportunity for fabrication and distortion by witnesses called to report them. McCormick, "The Turncoat Witness: Previous Statement as Substantive Evidence," 25 Tex. L. Rev. 573, 586–88 (1947). The trier of fact, thus, has a difficult task in determining whether to believe the present testimony of the declarant, or his prior out-of-court statement as related by another witness. Rather than entrust that responsibility solely to the trier of fact we choose to limit substantive admissibility of prior inconsistent statements to situations where the likelihood of fabrication is slight and the risk of coercion, influence or deception is greatly reduced. Graham, supra, 1582. Further, blanket admissibility of prior inconsistent statements would also permit the substantive use of oral statements made in jest or to boast of knowledge of criminal activity in which the declarant was not actually involved. Such oral statements, especially when other persuasive circumstantial evidence of guilt exists, would be inordinately difficult for the declarant to explain and might be critical in convincing the trier of the defendant's guilt.

We, therefore, adopt today a rule allowing the substantive use of prior written inconsistent statements, signed by the declarant, who has personal knowledge of the facts stated, when the declarant testifies at trial and is subject to cross examination.[8] The hazard of error is greatly lessened with respect to prior incon-

[8] We note that in three recent opinions this court decided that although a party may impeach his own witness, he may not introduce evidence of a prior inconsistent statement under the guise of impeachment in the hope that the jury will consider the statement substantively. *State* v. *Rivera*, 200 Conn. 44, 49, 509 A.2d 505 (1986); *State* v. *Jasper*, 200 Conn. 30, 34, 508 A.2d 1387 (1986); *State* v. *Graham*, 200 Conn. 9, 18, 509 A.2d 493 (1986). We depart from this aspect of those cases, in order to permit only prior written inconsistent statements signed by the declarant to be used for substantive purposes. The rule prohibiting the introduction of prior inconsistent statements under the guise of impeachment in the hope that the jury will use the evidence substantively will still, however, apply to prior oral statements.

sistent written statements signed by the declarant. Errors in transcription are rare and methods of detecting and establishing forgery or alteration are widely available. McCormick, supra, 588. Prior oral statements of a witness, easily manufactured and often difficult to rebut, should not be used to prove an element of a crime essential to guilt. Although the requirement that prior statements be written and signed by the declarant[9] is not an absolute guaranty of reliability, it does provide significant assurance of an accurate rendition of the statement and that the declarant realized it would be relied upon.[10]

After the incident which resulted in the death of the victim, Garassino gave a statement to the police, indicating that the defendant was the aggressor and instigator of the fight and that he had actually seen the defendant stab the victim. Garassino gave this statement voluntarily based upon his personal observations of the event and he signed it. The statement was given soon after the incident and long before the witness' memory might have faded. This statement, given to a police officer, had the added assurance of reliability that, if untrue, Garassino faced prosecution for falsely reporting an incident to the police; General Statutes

[9] Although we are not presented with such a situation here, we note that prior tape recorded statements possess similar indicia of reliability and trustworthiness to allow their substantive admissibility as well. See *Commonwealth* v. *Brady*, Pa. , 507 A.2d 66, 71 (1986).

[10] Because of congressional concerns for reliability and trustworthiness of prior statements, rule 801 (d) (1) (A) of the Federal Rules of Evidence has only partially abolished the common law prohibition against their substantive use, providing that a prior statement is not hearsay if the declarant testifies at trial, is subject to cross-examination concerning the statement and the statement was given under oath at a trial, hearing, other proceeding or in a deposition. Thus, under the rule as enacted, a party may introduce a prior inconsistent statement as substantive evidence only if it was originally made in testimonial form. Although we have similar concern over the untrustworthiness of some prior inconsistent statements, we believe that it is unnecessary to limit substantive admissibility to only those statements made in a formal adversarial setting.

§ 53a-180; *State* v. *Altrui,* 188 Conn. 161, 175, 448 A.2d 837 (1982); and, because the statement was also sworn, for giving a false statement to the police. General Statutes § 53a-157. The declarant testified at trial and was extensively examined by both the state and defense counsel concerning the discrepancies between the prior statement and his in-court testimony. The jury had an adequate opportunity to observe and examine the demeanor of the witness, to hear the testimony and to assess his credibility. The trial court did not err in refusing to instruct the jury that the prior statement could be used only to impeach the credibility of Garassino.

II

The dispositive issue in this appeal, raised in the defendant's supplemental brief, involves the trial court's instruction to the jurors that they could draw inferences from circumstantial evidence if "the inference asked to be drawn is not only logical and reasonable but is strong enough that you can find *that it is more probable than not that the fact to be inferred is true.*" (Emphasis added.)[11] The defendant contends that this charge unconstitutionally diluted the state's burden of proving the essential elements of the crime beyond a reasonable doubt. We agree.

Initially, we note that the defendant's failure to except to this portion of the charge ordinarily would

[11] The entire charge on circumstantial evidence was as follows: "Proof beyond a reasonable doubt does not mean that you must have direct evidence supporting a fact. You may apply the rule of circumstantial evidence. This rule involves the offering of evidence of facts from which you are asked to infer the existence of another fact or set of facts. Such an inference may be made provided two elements in the application of this rule are satisfied: That the inference asked to be drawn is not only logical and reasonable but is strong enough so that you can find that it is more probable than not that the fact to be inferred is true--that the fact from which you are asked to draw the inference has itself been proven beyond a reasonable doubt. It is your right to draw inferences if you conclude that the facts you find proven reasonably establish other facts by reason and logic and are not the result of speculation, surmise or guesswork."

render the claim of error unreviewable on appeal. Practice Book §§ 854, 3063. As we repeatedly have said, in the absence of a timely exception, this court will not address a claim of error unless it falls within the "exceptional circumstances" doctrine of *State* v. *Evans,* 165 Conn. 61, 327 A.2d 576 (1973) where the defendant can demonstrate the deprivation of a fundamental constitutional right and a fair trial. *State* v. *Preyer,* 198 Conn. 190, 196–97, 502 A.2d 858 (1985). The defendant's claim qualifies for *Evans* review because it implicates the fundamental constitutional right that the state establish his guilt beyond a reasonable doubt. *In re Winship,* 397 U.S. 358, 361, 90 S. Ct. 1068, 25 L.Ed. 2d 368 (1970). Further, the claim is basically similar to the kind of burden shifting claim on the element of intent; *Sandstrom* v. *Montana,* 442 U.S. 510, 524, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979); that we have found reviewable in the absence of an exception at trial in numerous instances. *State* v. *Williams,* 199 Conn. 30, 33, 505 A.2d 699 (1986); *State* v. *Amarillo,* 198 Conn. 285, 299 n.9, 503 A.2d 146 (1986); see *State* v. *Farrar,* 7 Conn. App. 149, 153 n.3, 508 A.2d 49 (1986).

We have had two occasions to examine "more probable than not" instructions on circumstantial evidence similar to those challenged in this case. In *State* v. *Reddick,* 197 Conn. 115, 132, 496 A.2d 466 (1985), cert. denied, U.S. , 106 S. Ct. 822, 88 L. Ed. 2d 795 (1986), we concluded that it was not "reasonably possible that the jury was misled by the alleged errors in the court's instructions." Despite the challenged language, we reasoned that the trial court's repeated references to the burden of proof "made abundantly clear to the jury that the burden of proof as to every element of the offenses charged was on the state, and that this burden had to be satisfied beyond a reasonable doubt." Id. In *State* v. *Rodgers,* 198 Conn. 53, 56–59, 502 A.2d 360 (1985), we concluded that a similar

instruction impermissibly diluted the requirement that the state establish guilt beyond a reasonable doubt[12] and held that "it cannot be said that the incorrect statement did not influence the jury."

In order to address the defendant's claim in this case, it is necessary to reconcile these two decisions. The Appellate Court recently had occasion to do just this in *State* v. *Farrar,* supra, 155, where it noted that the principal distinction between the two cases is that intent was a disputed issue in *Rodgers* but not in *Reddick.* The court reasoned that "[w]here the principal factual issue is intent, which is characteristically proven by circumstantial evidence; see *State* v. *Chace,* 199 Conn. 102, 105, 505 A.2d 712 (1986); the court's instructions regarding the use of circumstantial evidence as proof of this essential element are subject to close scrutiny." *State* v. *Farrar,* supra, 155. Alternatively, the court analyzed, "where . . . the principal factual issue is identity, which is not classically dependent upon circumstantial evidence for its proof, the trial court's instructions may be read as a whole to determine whether it is reasonably possible that the jury was misled by an erroneous explanation regarding the use of circumstantial evidence." Id.,155–56.

Adopting the foregoing analysis, we must resolve the defendant's claim in his favor. As in *Rodgers,* "[t]he present case particularly called for a correct instruction on the meaning and utilization of circumstantial evidence in a criminal case." *State* v. *Rodgers,* supra, 59. The primary issues before the jury in this case were

[12] We note that in *State* v. *Rodgers,* 198 Conn. 53, 58 n.2, 502 A.2d 360 (1986), the court had twice given the challenged instructions to the jury, once during its general instructions on burden of proof, and again during its specific instructions on the elements of the crime. Although the challenged instruction was only given once in the present case, we see no significant distinction between the two cases. *Rodgers* was not decided based upon the number of improper instructions, but solely on the erroneous instruction to the jury on a principal issue in the case.

whether the defendant intended to cause the death of the victim and whether the killing was justified by self-defense. The state argued zealously that the circumstances surrounding the victim's death indicated that the defendant intended to kill the victim and did not support the defendant's claim that the killing was undertaken in self-defense. The state also asserted that the number and severity of the stab wounds were indicative of the defendant's intent. The court instructed the jury that the only way to determine intent was to infer it from the facts and that all inferences must be reasonable and logical. Having been told that an inference may be drawn when "it is more probable than not that the fact to be inferred is true," the jury was, thus, permitted to draw the inference of intent, necessary to a finding of guilty, based on the erroneous probability standard. Although the court did instruct the jury on several occasions that intent must be proven beyond a reasonable doubt, it did not rectify the erroneous charge on circumstantial evidence. Because the focus of the case was intent, we conclude that it was reasonably possible that the jury was misled with respect to the state's burden of proving intent beyond a reasonable doubt.

There is error, the judgment is set aside and the case is remanded for a new trial.

In this opinion the other justices concurred.

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No. 86-553

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

STATE OF CONNECTICUT, Petitioner

v.

JOSEPH WHELAN, Respondent

ON WRIT OF CERTIORARI TO THE

SUPREME COURT OF CONNECTICUT

RESPONDENT'S BRIEF IN OPPOSITION

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November 1, 1986

31pp

QUESTIONS PRESENTED

I. MAY AN ERRONEOUS INSTRUCTION, WHICH CHARGED THE JURY IT MAY INFER THE ESSENTIAL AND DISPUTED ELEMENT OF INTENT FROM SURROUNDING CIRCUMSTANCES BY "A MORE PROBABLE THAN NOT" STANDARD, BE CURED BY INSTRUCTIONS THAT THE STATE MUST PROVE ITS CASE BEYOND A REASONABLE DOUBT?

II. [As stated by the petitioner] WHETHER AN ERRONEOUS INSTRUCTION ON THE STANDARD OF PROOF SHOULD BE SUBJECT TO HARMLESS ERROR ANALYSIS?

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No. 86-553

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

STATE OF CONNECTICUT, Petitioner

v.

JOSEPH WHELAN, Respondent

ON WRIT OF CERTIORARI TO THE

SUPREME COURT OF CONNECTICUT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent Joseph Whelan respectfully requests the Court deny the petition for writ of certiorari, seeking review of the Connecticut Supreme Court's opinion. That opinion was decided on 8/5/86 and is reported at 200 Conn. 743, ___ A.2d ___ (1986).

JURISDICTION

This Court lacks jurisdiction over question II because the issue of whether the harmless error standard of Chapman v. California, 386 U.S. 18 (1967), and/or Rose v. Clark, ___ U.S. ___, 106 S.Ct. 3101 (7/2/86), applied to the erroneous instruction was "not pressed" below by the petitioner, nor was it passed upon by the Connecticut Supreme Court. 28 U.S.C., sec. 1257(3); Illinois v. Gates, 462 U.S. 213, 217-21 (1983). The petitioner failed to raise the issue in the state appeal, either by addressing it in his appellee brief; App.A at 1A-3A; See Conn. Prac. Bk. (Rev. to 7/1/86), sec. 3060G; or in a motion for reargument; See Conn. Prac. Bk. (Rev. to 7/1/86), sec. 3111-2. The "not passed upon" criteria is fulfilled according to the petitioner's own argument. Pet. at 14-7. *1/

1. The respondent takes the position this was "not passed upon" solely on the basis of the petitioner's argument. He disagrees strongly with the petitioner's assessment that harmless error was refused. Infra, the respondent argues: that the petitioner has confused the evidentiary harmless error rule of Chapman and Rose v. Clark with the "whole charge review," of Cupp v. Naughten, 414 U.S. 141 (1973); and that the Connecticut Supreme did review the whole charge and also effectively undertook a harmless error review.

STATEMENT OF THE CASE

The respondent adopts the petitioner's facts, except for the following revisions, corrections and additions.

1. The Crime. Any assertion, direct or indirect, that the respondent started the fight by attacking the decedent, John Matulionis, is inaccurate. None of the three petitioner's witnesses who were present at the bar could state who started it or how it started. T.81,94,126-7,183; See Whelan, 200 Conn. at 745. The respondent, the only person to testify he knew how it started, said Mr. Matulionis attacked him first, and the respondent acted thereafter to defend himself. T.210-6. While it is true the state's version of how the fight proceeded differed markedly from the respondent's, *2/, there was no evidence Mr. Whelan started it.

Nor was there any direct evidence the respondent had any intent other than to defend himself. To prove criminal intent, the petitioner relied entirely on circumstantial evidence. T.244-6,273,285.

Direct evidence did established that Mr. Matulionis, a muscular well-built man weighing over 200 pounds, T.48-9, had not only been at the bar most of the evening preceding the fight, Pet. at 1, but also had been drinking alcohol for three hours and had taken drugs. T.51,56,60-2,108. To the bartender (a state's witness), he did not appear sober. T.62,108. Blood tests done as part of the autopsy confirmed Mr. Matulionis' intoxication: he had an alcohol level one and one-half times the maximum legal intoxication level; and over the maximum effective dosage of the drug propoxyphene, a methadone-like narcotic. T.51,54,56-7. Mr. Matulionis had a criminal record for assault, reckless endangerment and carrying a pistol without a permit. T.233-4; Ex.2,3,4. The autopsy also discovered circumstantial evidence of a fight: he had bruises on his knuckles. T.52.

2. The Jury Charge. The charge given was not "a standard instruction." Pet. at 2. There is no factual support this was "standard." Legally, standard references for jury instructions in Connecticut are Wright, Connecticut Jury Instructions (2d Ed. 1975), and Borden & Orland, Connecticut Criminal Jury

2. The Connecticut Supreme Court also did not find what the petitioner asserts, that the respondent was aided in the fight by a third person, Nicholas Romano. 200 Conn. at 745; Pet. at 1-2. The respondent's version was that he was attacked by Mr. Matulionis and fended him off alone. T.210-6.

Instructions (1986). Neither authority includes the "more probable than not" standard in their circumstantial evidence charges in criminal cases; inferences from circumstances to ultimate facts such as intent must be "beyond a reasonable doubt." Wright, sec. 655e; Borden & Orland, sec. 3.1.

In the jury charge, the trial court instructed twice on how to determine intent and both times incorporated the previously given circumstantial evidence rule, thereby linking the "more probable than not" standard to the jury's process of finding the essential element of intent. T.300-01,306-7. It charged that in the absence of direct evidence the only way to determine intent was to infer it from the surrounding facts and circumstances. Id. It commented that the case on intent was circumstantial and that the petitioner "asks you to infer that Mr. Whelan's intent was to cause the death ..." T.301. The court never corrected or modified its instruction that inferences — even those going to an element of the crime — may be found if they were "more probable than not."

The court also charged on three lesser included homicide offenses. T.304-14. The major distinction among these was the element of intent which ranged from intent to cause death to recklessness. Id. After deliberations had begun, the jury requested and received a recharge on the definition of these lesser offenses. T.332-5.

Although this was a brief trial with few witnesses, the jury deliberated for about ten hours over two days before returning their verdict. T.326,331, 335,337.

3. The Petitioner's Brief In State Court. In its brief to the Connecticut Supreme Court, the petitioner did not request the court to apply the harmless error standard of Chapman or Rose v. Clark. App. at 1A-3A. It did not argue the evidence was so overwhelming as to make the error harmless beyond a reasonable doubt. Id. It sole request was that the error be reviewed in the context of the rest of the instructions, not the entire record. App. at 1A-3A.

4. The Connecticut Supreme Court's Opinion. The opinion did not hold that all inferences in a criminal case must be beyond a reasonable doubt, only those affecting ultimate facts such as the defendant's "intent to cause the death of a person." Whelan, 200 Conn. at 758. The court held the circumstantial evidence charge infected the definition of proof beyond a reasonable

doubt by charging the jury "the only way to determine intent was to infer it from the facts," 200 Conn. at 757, thus "permit[ting the jury] to draw the inference of intent, necessary to a finding of guilty, based on the erroneous probability standard." 200 Conn. at 758.

Even where ultimate facts are affected, the court will not necessarily reverse. 200 Conn. at 756-7. It will always review the rest of the charge — either under close scrutiny or otherwise — to determine if the jury was possibly misled. 200 Conn. at 757, 758. There is no indication whatsoever that it "effectively created a per se rule." Pet. at 4. It specifically acknowledged it reviewed the rest of the instructions here and found the error was not cured. 200 Conn. at 758.

The court also stated it looks to the evidence to determine whether the case "'particularly called for a correct instruction on the meaning and utilization of circumstantial evidence in a criminal case.'" 200 Conn. at 757. Here, circumstantial evidence and intent were factually in dispute and the focus of the case. Id.

REASONS FOR DENYING THE WRIT

I. THE PETITIONER'S ARGUMENT I IN ITS REASONS FOR GRANTING THE WRIT NEITHER WAS RAISED BY THE PETITIONER BELOW, NOR IS IT RAISED IN THE QUESTION PRESENTED IN THIS WRIT.

The first Question Presented by the petitioner is a narrow one. It is whether the erroneous instruction on circumstantial evidence was cured by other parts of the charge indicating the burden was on the state to prove its case beyond a reasonable doubt. Pet. at i. It does not question whether the circumstantial charge was itself correct or not. It does not challenge the findings of the Connecticut Supreme Court that the jury had to use the circumstantial evidence rule to determine intent and that the trial court incorporated the rule into the definition of proof beyond a reasonable doubt. Fairly read, the question assumes the circumstantial charge was erroneous and asks the sole question of whether it was cured by the trial court's other instructions.

The stance taken in the Question Presented is not surprising because it is the same one taken by the petitioner to the Connecticut Supreme Court. There, the state did not claim the circumstantial charge given by the trial

court was correct. It did not counter the respondent's claim in his state appeal that the trial court's charge diminished the constitutional standard for the burden of proof. The petitioner's only argument was this: "It is respectfully submitted that the instant case ... should be subject to a 'whole charge' test." App. at 3A.

Yet in its Argument I, Pet. at 6-14, under Reasons For Granting The Writ, the petitioner dwells solely on the correctness of trial court's circumstantial evidence charge. The curative value of the rest of the instructions is not mentioned at all. Id. The petitioner does not address the matter raised in his first Question Presented until his argument at pages 14-17, and then he misstates the argument as one of harmless error.

This is an attempt to do indirectly what it cannot do directly. It is an attempt to avoid the respondent's legitimate claim that the petitioner lacks jurisdiction to now claim the charge was correct. Gates, 462 U.S. at 217-24. He had every opportunity to assert this in state court, but failed to do so. *3/ As the Gates case explains, the "not pressed or passed on below" rule applies in these situations where the state failed to raised a defense. 462 U.S. at 221. Failure to present the defense takes away from a state court the opportunity to modify its decision "even if it agrees with the State as a matter of federal law, [by resting] its decision on an adequate and independent state ground." Id., 222. *4/ Nor is this issue reviewable as a mere enlargement of the question presented. Gates, 462 U.S. at 219-20. Whether an erroneous charge is cured by other instructions is a separate issue from whether the particular charge was in error. Cupp v. Naughten, 414 U.S. 141, 147 (1973). For these reasons, the Court lacks jurisdiction to consider the issue raised in Argument I.

In addition, since the petitioner failed to raise the issue of the correctness of the charge in its Question Presented, this Court should not consider the claim. S.Ct. Rule 21.1(a).

3. Counsel for the petitioner on this writ was not trial or appellate counsel in the state proceedings. It is interesting to note that present counsel was involved in a previous Connecticut case involving this same issue; State v. Farrar, 7 Conn. App. 149, 152-6, 508 A.2d 491 (4/2/86); where he had no difficulty or hesitation in raising the issue to the state court. Id., 153.

4. Although the decision is silent on the matter, the respondent raised the issue in his appellant brief under both the federal and state constitution. Whelan, 200 Conn. at 755-8.

II. THE CONNECTICUT SUPREME COURT'S DECISION'S DID NOT MISCONSTRUE THE IMPORTANCE OF THE CIRCUMSTANTIAL EVIDENCE INSTRUCTION; NOR IS IT IN CONFLICT WITH DECISIONS OF THIS COURT OR THOSE OF OTHER STATES; NOR IS THE ADMINISTRATION OF JUSTICE THREATENED.

A. The Petitioner Misconstrues The Connecticut Supreme Court's Decision Which Is Supported By — Not In Conflict With — Decisions Of This Court.

The Connecticut Court's holding was not the broad, sweeping one of automatic reversal the petitioner insists upon. Instead, the decision was a carefully-drawn, narrow holding giving due consideration to the individual charge, its effect on the charge as a whole and its impact in the context of the evidence.

The charge on circumstantial evidence was the only charge given on how to to infer facts from other circumstantial facts. The trial court did not distinguish inferences made to intermediate as opposed to ultimate facts. It informed the jury that any inference — including those to ultimate facts such as the respondent's criminal intent — could be made as long as it was "more probable than not." While this standard is appropriate for intermediate inferences, it is plainly inappropriate for the ultimate ones. In Re Winship, 397 U.S. 358, 361 (1970). Here, the trial court compounded the error in its charge on intent by making direct references to its previous circumstantial evidence charge. It told the jury the only way to find criminal intent was to use inferences, and it had told the jury it was to use a more probable than not standard in doing this. Although it stated elsewhere intent must be proved beyond a reasonable doubt, it had already instructed the jury on how it reaches that conclusion — by using the diminished "more probable than not" standard.

Nowhere in the holding does the Connecticut Supreme Court state that intermediate inferences must be proved beyond a reasonable doubt. See Pet. at 6. This case involved the affect on ultimate conclusions only. In criticizing the court for authoring a broader, unwarranted result, the petitioner ignores the plain words of this and its predecessor case. State v. Rodgers, 198 Conn. 53, 58 n.1 (1985); Whelan, 200 Conn. at 755-8.

Second, despite the petitioner's assertions to the contrary, the Connecticut Supreme Court did review error in the context of the rest of the charge. 200 Conn. at 758; See Cupp v. Naughten. It found that the repetition of the reasonable doubt standard did not correct the misconception because the court

had incorporated the more probable than not standard into that very concept. Since the trial court had effectively charged that the jury may conclude intent is proved beyond a reasonable doubt by inferring it more probably than not from surrounding facts, it is of no consequence how many times proof beyond a reasonable doubt charge was stated. What was of consequence was whether the erroneous charge was corrected or somehow modified so that its impact was not misleading, and this did not happen. 200 Conn. at 758.

Third, the Connecticut Supreme Court undertook an evidentiary review of the entire case to determine whether the case should be reversed. 200 Conn. at 757-8. It found the "primary issues ... were whether the defendant intended to cause the death of the victim and whether the killing was justified by self-defense." 200 Conn. at 757-8. There was no direct evidence of criminal intent; even the surrounding facts were open to differing interpretation. 200 Conn. at 745,758. From the underlying facts it believed established, "[t]he state argued zealously" to infer the criminal intent and reject the defense. Id. Taking all of this into account, the court could not find the erroneous instruction on this focused and highly disputed factual issue could be harmless beyond a reasonable doubt. Rose v. Clark, 106 S.Ct. at 3109.

The petitioner's claim that the case is in conflict with this Court's decisions is baseless. The argument presented is admittedly difficult for the respondent to follow, for it appears that the petitioner concedes that there is a distinction between inferences to intermediate or ultimate facts and that ultimate facts must be inferred beyond a reasonable doubt. Pet. at 7-8, citing Leary v. United States, 395 U.S. 6, 36 (1969), and County Court Of Ulster County v. Allen, 442 U.S. 140, 166-7 (1979). Moreover, Ulster County directly supports the Connecticut Supreme Court's analysis of intermediate vs. ultimate facts and the burden of proof to be assigned to the latter, 442 U.S. at 156:

> It is often necessary for the trier of fact to determine the existence of an element of the crime — that is the "ultimate" or "elemental" fact — from the existence of one or more "evidentiary" or "basic" facts. [cites omitted]. .... Nonetheless, in criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced be the State, to find the ultimate facts beyond a reasonable doubt.

B. There Is No Conflict With Courts Of Other Jurisdictions.

The cases cited by the petitioner do not bear out his contention that decisions of other jurisdictions are in conflict with this case. None of the cases directly involves a trial court's charge on the burden of proof to be assigned to inferences establishing the ultimate fact of criminal intent.

Many of the cases concerned the issue of sufficiency of the evidence. Their statements that every underlying fact or inference need not be proved beyond a reasonable doubt is not in dispute. But none of these cases hold that ultimate facts may be inferred by anything less than that standard. State v. Brown, 80 N.J. 587, 404 A.2d 1111, 1113 (1979); Commonwealth v. Beckett, 374 Mass. 329, 366 N.E.2d 1252, 1260 (1977);People v. Foster, 76 Ill.2d 365, 392 N.E.2d 6, 9 ((1979);State v. Fitzpatrick, 163 Mont. 220, 516 P.2d 605, 609 (1973).

State v. Cohen, 108 Iowa 208, 78 N.W. 857, 857-8 (1899), cited at Pet. p. 10, to support its claim, contains this language which contradicts its stance and supports the respondent: "[W]e deem [the jury charge] more likely to have been thought by the jury to refer to facts or circumstances essential to the conviction, and which, according to all authorities and sound reasoning, must be established beyond a reasonable doubt." 78 N.W. at 857.

Although its language does aid the petitioner, it should be noted that People v. Klinkenberg, 90 Cal.App.2d 608, 204 P.2d 47 (2d Dist. Ct of App. 1949), is not a decision by a court of last resort. In denying a further appeal hearing in the same case, the California Supreme Court stated, "such denial does not constitute approval of the discussion definitive of circumstantial evidence and relative to the failure of the trial court to give the instructions on that subject as requested." People v. Klinkenberg, 204 P.2d 613 (1949).

Nor is State v. Davis, 25 N.C.App. 181, 212 S.E.2d 516, 518 (1975), from a court of last resort. Moreover, the court did not reach the merits but denied the claim for failure of the defendant to request the charge at trial.

Nor is United States v. Hernandez-Miranda, 601 F.2d 1104, 1107 (9th Cir. 1979), or State v. Green, 126 Vt. 311, 228 A.2d 792, 793-4 (1967), contrary to the holding of this case.

Finally, the last three cases cited all conform, according to the peti-

tioner's own statement, to the respondent's and the Connecticut Supreme Court's concerns over misleading the jury on inferences to ultimate facts. Pet. at 12; Williamson v. State, 248 Ga. 47, 281 S.E.2d 512 (1981); Pressely v. State, 295 Md. 347, 454 A.2d 347 (1983); Commonwealth v. Turner, 456 Pa. 116, 317 A.2d 298 (1974).

C. The Petitioner's Complaint About The Impact On The Finality Of Judgments And The Administration Of Justice Is Speculative.

The petitioner's argument appears to be connected strongly to its belief that the holding of this case is much broader than the Connecticut Supreme Court has ever indicated. Whatever that belief is and however narrow the actual holding, the petitioner's fears seem to be only that. At present, there have been a total of four cases in Connecticut where this issue was decided. In two cases, reversible error was found; Whelan, 200 Conn. at 755-8; Rodgers, 198 Conn. at 57-9; in two others, no error was found; State v. Reddick, 197 Conn. 115, 130-3, 496 A.2d 466 (1985); Farrar, 7 Conn. App. at 149-56. Two cases do not add up to a significant impact.

Further, as noted in the Statement Of The Case, infra, the erroneous instruction involved here was not a standard one. Standard jury instructions in Connecticut advise the beyond a reasonable doubt standard be used instead of "more probable than not." Wright, sec. 655e; Borden & Orland, sec. 3.1. Coupling this with the Connecticut Court's narrow holding, its review of the entire charge and its review of the trial evidence, the result does not appear to be a formula for for widespread, arbitrary, undeserved reversals of convictions.

III. THE CONNECTICUT SUPREME COURT DID NOT REFUSE TO REVIEW THE REST OF THE JURY INSTRUCTIONS, NOR DID IT REFUSE TO APPLY HARMLESS ERROR.

The only argument advanced by the petitioner in the state appeal was that the erroneous circumstantial evidence charge was cured by the many references to proof beyond a reasonable doubt. This, of course, is the rule of Cupp v. Naughten, not the harmless error rule of Rose v. Clark and Chapman. The former rule is a determination of whether any error exists in the charge at all, for if there is no reasonable possibility that the charge, read as a whole, misled the jury, there is no error. Harmless error comes into play if and only if a conclusion is reached that the charge as a whole is erroneous. An instruc-

tional error is nevertheless a harmless one when reviewed in the context of the evidence.

> [T]he inquiry is whether the evidence is so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption [of intent]. [underlining added].

Rose v. Clark, 106 S.Ct. at 3109, quoting Connecticut v. Johnson, 460 U.S. 73, 97 n.5 (Powell, J. dissenting, 1983). This distinction appears to be lost on the petitioner.

Under the Jurisdiction section of this brief, the petitioner argued this Court should not hear this issue because the state failed to raise it below. Additionally under the same argument, its claim that the Connecticut Court "refused" to apply harmless error is groundless. It is impossible to refuse what was not offered.

The respondent adds the ground that the petitioner has failed to argue any of the evidence in its writ, leaving to speculation why it believes the evidence was so overwhelming that it was "unnecessary to rely on" the more probable than not instruction on inferences to ultimate facts. Rose v. Clark, 3109. Either the petitioner's silence was an oversight or it was clear to it, as it was to the respondent and the Connecticut Supreme Court, that this error was not harmless beyond a reasonable doubt.

The entirety of the petitioner argument under his section II is devoted to the curative aspects of other parts of the charge, and, of course, the Connecticut Court's refusal to apply the "whole charge" test. Suffice it to say that the court did review the rest of the charge, but because the diminished burden of proof was incorporated into the intent charge and provided the only instruction on how to advance from surrounding facts to the ultimate conclusion, other instructions did not cure the charge. Whelan, 200 Conn. at 757-8; See also this brief, p.6-7.

CONCLUSION

For all of the foregoing reasons, the respondent respectfully requests this Court to deny the writ.

THE RESPONDENT
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No. 86-553

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

STATE OF CONNECTICUT, Petitioner

v.

JOSEPH WHELAN, Respondent

ON WRIT OF CERTIORARI TO THE

SUPREME COURT OF CONNECTICUT

APPENDIX TO THE
RESPONDENT'S BRIEF IN OPPOSITION

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SUPREME COURT

OF THE

State of Connecticut

JUDICIAL DISTRICT OF FAIRFIELD

NO. 12647

STATE OF CONNECTICUT

V.

JOSEPH WHELAN

SUPPLEMENTAL BRIEF OF THE STATE-APPELLEE

JONATHAN C. BENEDICT
Assistant State's Attorney
Judicial District of Fairfield

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To be argued by:

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THE NATURE OF THE PROCEEDINGS AND THE FACTS

For the statement of the nature of the proceedings and the facts, reference is to the Appellee's Brief (pp 2-7) and the argument herein.

2

ARGUMENT

The trial court instructed the jury specifically on circumstantial evidence one time (see State v. Rodgers, 198 Conn. 53, 58 at N. 1) in the early "boiler plate" portion of its instructions. (T. 292-3) While appellant in his supplemental brief has set out the specific instruction, he ignores the lead-in to that instruction to wit:

> "The State does not have to prove every fact that comes into issue. It is only the essential elements of the crime which I will explain to you that must be proved beyond a reasonable doubt. Proof beyond a reasonable doubt does not mean that you must have direct evidence supporting a fact...(T. 292)

While the specific circumstantial evidence instruction thereafter given essentially tracks the instruction considered in Rodgers, supra, 57 it should be noted that in subsequently instructing the jury as to the elements of the underlying offense, the court invariably characterized them as essential elements that need be proven beyond a reasonable doubt. (T. 298, 299, 300, 302, 303) While the court, in discussing the element of intent, gave the customary reference to circumstantial evidence, it did not at that point use the language deemed offensive in Rodgers, supra, e.g. "more probable that the fact to be inferred is true." Indeed, in recapping this portion of its charge, the court specifically stated:

> "If the State has not proven those essential elements beyond a reasonable doubt, you would not find the Defendant guilty of murder. The State is required to prove all of the essential elements of the crime beyond a reasonable doubt and those are the essential elements of murder, that is, that Mr. Whelan

stabbed the victim and when he did it is his intention to kill him. (T. 303)

In referring to the defense of justification, the court did not allude to circumstantial evidence at all and placed the burden of disproving the claim squarely upon the State and beyond a reasonable doubt. (T. 314-315, 319-310) At both the start and end of its summarization, the court reiterated that the burden proof of the elements of the charge was beyond a reasonable doubt. (T. 318, 322-3)

It is respectfully submitted that the instant case, distinguishable in a number of ways from State v. Rodgers, supra should be subjected to a "whole charge" test. State v. Marra, (95 Conn. 421, 440 (1985) While circumstantial evidence was offered and argued against the defendant here, the state's allegations in Rodgers, including not only intent but even identification and the penetration element of the sexual assault charge, depended almost entirely upon circumstantial evidence. While Rogers declined to testify at his trial, this defendant, did take the stand and, in alleging self defense, admitted stabbing the victim. In referring to the application of circumstantial evidence vis a vis the element of intent the Court did not repeat the offensive instructions, rather it clearly stated that intent was an essential element that required proof beyond a reasonable doubt. Lastly, the claim of self defense revolved entirely around the testimony of two witnesses, William Collette and the defendant and thus clearly went to the jury as a question of credibility rather than circumstantial proof of facts.

The trial court, in introducing the subject of circumstantial evidence drew the distinction between "every fact that comes in issue" on the one hand and, on the other, the "essential elements of the crime" which of course are the only matters requiring proof beyond a reasonable doubt. State v. Rodgers, supra,

58 N. 1. While it then gave the unfortunate instruction, it subsequently reiterated on a number of occasions that any essential element has to be proven beyond a reasonable doubt. Its charge on self defense included similar language. Consequently, it is urged that this court, in determining "whether an error in a charge constitutes reversible error...consider the whole charge...from the stand point of its effect on the jury in guiding them to a proper verdict. State v. Marra, supra 440-441. It is respectfully submitted that, given the charge as a whole, it is not reasonably possible that the jury was misled. State v. Marra, supra, 441. State v. Williams, 182 Conn. 262, 268, 438 A.2d 80 (1982).

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